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No. 02-1677

In The
Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Petitioners,

v.

NATHANIEL TRULL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITIONERS

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MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari in the above-referenced case.*

PLAC is a non-profit association with 135 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed 43 briefs as *amicus curiae* in this Court (and over 600 briefs in state and federal courts combined), presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Exhibit A.

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* Petitioner consented to the filing of the attached brief, but Respondent did not.

Of all parties, product manufacturers are perhaps most adversely affected by the unpredictable application of waiver rules to objections to inconsistent verdicts. Federal courts regularly adjudicate product liability cases under state law that recognizes both strict liability and negligence, and permits plaintiffs to pursue both claims in a single action. Those claims invite inconsistency when both claims are founded on a defective design: a jury that finds no design defect on a strict liability claim cannot rationally hold the manufacturer liable for negligently designing or manufacturing that non-defective product, yet it happens with some frequency. Thus, in the product liability setting, parties need to know what objections they need to make, and when, to preserve the constitutional right to a rational verdict. PLAC members are accordingly vitally interested in ensuring that the preservation rules are consistently and fairly applied, so manufacturers have notice of how to assure judgment based on a rational verdict, and review if judgment is entered on an irrational verdict.

Conflict among the circuits' interpretation of Rule 49 and Rule 51, however, makes protection against inconsistent verdicts a lottery. There are conflicts among and within the circuits about (1) whether Rule 51 requires parties to object to submission of potentially inconsistent claims before the jury is charged; (2) whether Rule 49 requires parties to object before discharge of the jury to inconsistent general verdicts, inconsistent special verdicts, or both; and (3) where courts hold the duty to make a pre-discharge objection turns on whether the jury returned general or special verdicts, how to determine which verdict is which. Parties, and manufacturers in particular, therefore cannot know what objections are required when, and have no reliable way to assure they do not suffer from the

most fundamental of errors – judgment based on inconsistent verdicts.

As a representative of parties frequently faced with inconsistent verdicts, PLAC is well suited to share with the Court the broader perspective of the product manufacturing community on the extent of the circuit conflict, as well as its severe and recurring consequences. For these reasons, PLAC respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether, under Federal Rule of Civil Procedure 49, a party waives its objection to the entry of judgment in a manner inconsistent with the jury's finding on a mixed question of law and fact by failing to note the inconsistency before the jury is discharged.

2. Whether, under Federal Rule of Civil Procedure 51, a defendant's failure to object to the submission of a case to the jury on multiple liability theories waives a subsequent argument that the jury's findings on those theories are inconsistent.

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC")[1] is a non-profit association with 135 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed 43 briefs as *amicus curiae* in this Court (and over 600 briefs in state and federal courts combined), presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Exhibit A.

Of all parties, product manufacturers are perhaps most adversely affected by the unpredictable application of waiver rules to objections to inconsistent verdicts. Federal courts adjudicate many product liability cases under state law that recognizes both strict liability and negligence, and permits plaintiffs to pursue both claims in a single action. Those claims invite inconsistency when both are founded on a defective design: a jury that finds no design

[1] Pursuant to Supreme Court Rule 37.6, PLAC states that PLAC alone paid for the preparation of this brief.

defect on a strict liability claim cannot rationally hold the manufacturer liable for negligently designing or manufacturing that non-defective product, yet it happens with some frequency. Thus, in the product liability setting, parties need to know what objections they need to make, and when, to preserve the constitutional right to a rational verdict. There are conflicts among and within the circuits about (1) whether parties must object to submission of potentially inconsistent claims before the jury is charged; (2) whether parties must object to an inconsistent verdict before discharge of the jury; and (3) where duty to make a pre-discharge objection turns on whether the jury returned a general or special verdict, how to determine which verdict is which. The uncertainty on these issues leaves manufacturers in the dark about how to preserve their rights. PLAC's members accordingly have a strong interest in this Court's consideration of *Volkswagen of America v. Trull*, No. 02-1677, as it provides an opportunity to resolve the circuit conflicts on what constitutes a general or special verdict and what requirements a party must satisfy to preserve objections to inconsistent verdicts under Federal Rules of Civil Procedure 49 and 51.

SUMMARY OF ARGUMENT

This is a textbook case for review. Waiver is a threshold issue for appellate review, which can be dispositive of the case regardless of the underlying merits. The conflicts in the waiver rules concerning inconsistent verdicts are substantial and well-recognized:

- The courts of appeals disagree as to whether a party waives objection unless the party objects to an inconsistent verdict before the jury

is discharged: some courts hold that pre-discharge objection is required only for inconsistent general verdicts (under Rule 49(b)) but not special verdicts (under Rule 49(a)), and other courts hold that pre-discharge objection is required regardless what kind of verdict is at issue.

- Where the rule turns on the distinction between general and special verdicts, the courts of appeals further disagree as to how to tell one from the other.

- The courts of appeals disagree about whether Rule 51 requires a party to object to the submission of multiple theories to the jury at the outset.

These conflicts present a minefield for parties trying to preserve objections.

In product liability cases, the inconsistent verdict scenario is played out again and again, in court after court, in circuit after circuit. And the results are, truly, random and the consequences severe. In some circuits a party who made no objection at all before the jury was discharged gets review of the merits, while in others a party who objected (but by that circuit's strict rules not enough or at the wrong time) gets none. Thus, the conflicting waiver rules are, in many cases, outcome determinative. That should not happen, much less on an issue like inconsistent verdicts, where failure to review the issue can lead to entry of a wrong judgment, which in turn impugns the integrity of the judicial process and fundamentally undermines the right to a jury trial. This Court's guidance is badly needed.

ARGUMENT

The *Trull* case is not unique. It is hard for counsel to foresee verdict inconsistency, or appreciate its appearance in the moment the jury's verdict is read. Even when its risk is apparent, the governing law (often state law) may not permit effective prevention. And varying rules even within circuits make it impossible to know which objections are required for which kinds of inconsistency, and when they must be made. The best protection against these unpredictable waiver rules is to make what some circuits deem frivolous and meritless objections – itself a problem.

Review is appropriate whenever conflicts among the circuits prevent the uniform application of the federal rules. Review is particularly appropriate here. Entry of judgment on an inconsistent verdict risks subversion of the jury's intentions, liability where there should be none (or vice versa), and so threatens the integrity of the judicial system and fundamental constitutional rights. If ever the federal rules should be clear and consistent, it is here. But they are not, and the varying waiver rules can be outcome determinative, yielding an affirmance in one case in one circuit and reversal in an identical case in another circuit. The Court should grant review to put an end to recurring problems where the integrity of the judicial process is at stake.

I. THE LAW IS CONFUSED ON HOW TO PRESERVE OBJECTIONS TO INCONSISTENT VERDICTS.

There is tremendous confusion among, and even within, the circuits regarding what counsel must do to preserve objections to inconsistent verdicts.

A. The Conflict On Whether Pre-Discharge Objections Are Required.

The cases conflict on whether objections are required to inconsistent verdicts before the jury is discharged, and under what circumstances. The conflict is so baffling that one circuit has thrown up its hands, expressly acknowledging the confusion but postponing the chore of "untangling these [] precedents." *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274 n.4 (11th Cir. 2002). Bereft of guidance from the Court, cases deal with the problem in drastically different ways.

Some circuits seem to require pre-discharge objections regardless of whether the verdict is a special verdict under Rule 49(a) or a general verdict under Rule 49(b). *See Golub v. J.W. Gant & Assoc.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *Williams v. KETV Television*, 26 F.3d 1439, 1443 (8th Cir. 1994); *Seven Provinces Ins. Co. v. Commerce & Industry Ins. Co.*, 65 F.R.D. 674, 690 (W.D. Mi. 1975).

Other circuits hold pre-discharge objections are required for ***general*** verdicts under Rule 49(b), but not for ***special*** verdicts under Rule 49(a). *See, e.g., Simmons v. Philadelphia*, 947 F.2d 1042, 1057 (3rd Cir. 1991); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993); *Ladnier v. Murray*, 769 F.2d 195, 198 n.3 (4th Cir.

1985); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 726 (4th Cir. 1999).

Even *within* some circuits the law is confused. Take the First Circuit. *Bonilla v. Yamaha Motor Corp.*, 955 F.2d 150, 152 n.2, 155-56 (1st Cir. 1992), holds pre-discharge objections are required in cases involving ***special*** verdicts under Rule 49(a). In this case, however, the First Circuit's finding of waiver was tied to its finding that the jury returned general verdicts, implying the waiver rule only applies to ***general*** verdicts under Rule 49(b). *See Trull v. Volkswagen of Am., Inc.*, 311 F.3d 58, 62 (1st Cir. 2002). *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981), required pre-discharge objections without distinguishing between Rule 49(a) and Rule 49(b).

Among the courts that hold the rule turns on the Rule 49(a)/Rule 49(b) special/general verdict distinction, the agreement ends there. The courts disagree on what constitutes a special verdict under Rule 49(a) and a general verdict under Rule 49(b). For example, verdicts comparable to the verdict in this case have been characterized as both general and special, depending on the circuit. *See Simmons*, 947 F.2d at 1057-58 (special verdict); *McCollum v. Stahl*, 579 F.2d 869, 871 (4th Cir. 1978) (same); *but see Trull v. Volkswagen of Am., Inc.*, 311 F.3d 58, 62 (1st Cir. 2002) (general verdict); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 55-56 (2d Cir. 2002) (same), *cert. denied*, 123 S. Ct. 539 (2002). Once again, the courts acknowledge the conflict, but have not resolved it (if they have addressed it at all). *See Mason*, 307 F.3d at 1274-75; *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n.16 (3d Cir. 1993). The confusion over what is (or is not) a general or special verdict makes it difficult, and in some cases impossible, for parties to predict which waiver rules apply to their case.

Counsel cannot even rely upon a characterization of the verdict form by the consensus of the district court and the parties. For even if the form is labeled "special verdict," and is so described by the trial court and all parties, there is the risk on appeal (as happened here) of an unexpected "gotcha" holding: retroactive re-definition of the verdict form's character, and a corresponding retroactive application of surprise preservation rules that bar consideration of the merits.

Surprise waiver rules like that undermine the very foundations of the waiver doctrine. Waiver is an "*intentional* relinquishment or abandonment of a known right or privilege." *Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (quotation omitted) (emphasis added). To be intentional, abandonment of the right must be knowing. *See Cordrey v. Euckert*, 917 F.2d 1460, 1465 (6th Cir. 1990); *see also Collier v. Estelle*, 488 F.2d 929, 932 (5th Cir. 1974). Thus, the premise for finding a review-barring waiver must be that the party knew it was waiving rights in failing to object, and so intentionally give up the right to review. An unpredictable waiver doctrine defeats the premise: a party who cannot predict the duty to object does not knowingly relinquish rights in not objecting.

Without review by this Court, courts of appeals will continue to apply unpredictable rules for preservation of objections in direct contradiction with the "intentional relinquishment" requirement that justifies imposition of waiver's harsh consequences in the first place.

B. The Conflict Over The Need To Object To Submission Of Potentially Conflicting Theories.

The circuits also conflict over interpretation of Rule 51, and whether it requires a party to object to the submission of multiple theories to the jury to preserve objections to later inconsistency.

The First, Second, and possibly Eleventh, Circuits require an objection to the submission of multiple theories before the jury is charged. *See Trull*, 311 F.3d at 63; *Babcock v. General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002); *Jarvis*, 283 F.3d at 53-65; *Mason*, 307 F.3d at 1276 n.7 & n.8. In contrast, the Third Circuit has rejected the contention that failure to object to jury instructions and interrogatories under Rule 51 precludes a later argument that the verdicts are inconsistent. *See Loughman*, 6 F.3d at 103. Several other courts implicitly agree with the Third Circuit position by not requiring such an objection before conducting their review. *See, e.g., Oja v. Howmedica Inc.*, 111 F.3d 782, 790 (10th Cir. 1997); *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1147-48 (6th Cir. 1996); *Werner v. Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980).

This conflict leaves parties baffled about the proper time and way to object in cases at risk for inconsistent verdicts. The dilemma is worse still where the apparently-required objection is futile because the substantive law expressly permits the submission of the potentially conflicting theories that the procedural law would require parties to oppose. Indeed, this case is the paradigm: The First Circuit held that New Hampshire law allows both strict liability and negligence theories to go to the jury, yet condemned Volkswagen for failing to object to the submission of both to the jury. *Trull*, 311 F.3d at 63. Rule 11 and

ethical obligations potentially put counsel at risk if they make objections that are not well-taken. *In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991) (Rule 11 sanctions imposed where objections in complaint lacked any basis in law or fact); *Jazzland, Ltd. v. Bordenave*, 1999 U.S. Dist. LEXIS 7818, *6 (E.D. La. May 20, 1999) (party ordered to show cause why Rule 11 sanctions should not be imposed for frivolous objections in motion). And even if permitted, token objections doomed to failure are a waste of judicial time and should not be encouraged.[2] The uncertain preservation rules, however, encourage futile objections and could even force counsel to choose between preserving their clients' rights and complying with ethical rules. That cannot be right.

The conflicts here are real. The Court should resolve them.

II. THE CONFLICTS ARE IMPORTANT TO RESOLVE: RECURRING PROBLEMS, DISPARATE RESULTS, AND UNSUPPORTED VERDICTS.

This Court will grant review to resolve conflicts and assure uniform application of the Federal Rules of Civil Procedure. *See Becker v. Montgomery*, 532 U.S. 757, 762 (2001) (granting certiorari to ensure uniformity in Federal

[2] Requiring objections that the governing law holds meritless also forces parties to undermine their own credibility, in turn imperiling later motions or objections. *Honeycutt v. Mahoney*, 698 F.2d 213, 219 (4th Cir. 1983) (counsel should "not [ ] annoy or antagonize judge or jury by objections perceived by the judge to be meritless"). Preservation rules should not be designed to alienate the court.

Rules of Appellate Procedure); *United States v. F & M Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (granting certiorari because conflict involves application of provisions of federal rules); *superseded by statute on other grounds*, 352 F.2d 942 (D.C. Cir. 1965). That alone is reason for review here. The recurrence of the issue, the disparate results under the conflicting rules, and the erroneous judgments that result, make the case for review stronger still.

A. Inconsistent Verdicts Are A Recurring Problem.

The inconsistent verdict issue is a recurring one. Every case involving overlapping legal theories presents the potential for inconsistent verdicts. There are scores of reported cases addressing the problem, and countless unreported dispositions. In 2002 alone, the First Circuit decided two cases addressing the same inconsistent verdict issue under New Hampshire law (this case and *Babcock v. General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002)), and that Court has yet another before it in 2003. *See Cabrera v. Hyundai Motor Co.*, No. 02-2232 (fully briefed and to be argued this summer). That is just one issue in one circuit; 2002 saw many other inconsistent verdict issues. *See, e.g., Howard v. Antilla*, 294 F.3d 244, 250-251 (1st Cir. 2002); *Jarvis*, 283 F.3d at 55-56; *Mason v. Ford Motor Co.*, 307 F.3d at 1274-75; *El-Hakem v. BJY, Inc.*, 2003 U.S. Dist. LEXIS 8143, *18 (D. Or. March 19, 2003); *Frazier v. Boyle*, 206 F.R.D. 480, 493 (D. Wi. 2002); *Aerotech Res., Inc. v. Dodson Aviation, Inc.*, 191 F. Supp. 2d 1209, 1220-21 (D. Ks. 2002).

In the field of product liability alone, inconsistent verdicts are a perennial problem. The cases are frequent diversity cases in federal court, governed by state law that often invites inconsistent verdicts. Most states, like New Hampshire, recognize product design claims based upon both strict liability and negligent design. *See, e.g., Jiminez v. Sears, Roebuck & Co.*, 482 P.2d 681, 686 (Cal. 1971); *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 56-57 (2d Cir. 1992) (Vermont law); *Brown v. Yamaha Motor Corp.*, 691 P.2d 577, 579-80 (Wash. Ct. App. 1984); *Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp.*, 349 N.W.2d 280, 284 (Minn. Ct. App. 1984), *aff'd in part, rev'd in part*, 366 N.W.2d 111 (Minn. 1985). Both claims have as a predicate a design defect; if a design is not defective, it is not negligent to adopt it.

> A manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective because: (1) if a product is not unreasonably dangerous because of the way it was manufactured, it was not negligent to manufacture it that way and (2) even if the manufacturer was somehow negligent in the design or production of the product, that negligence cannot have caused the plaintiff's injury because the negligence did not render the product "unreasonably dangerous."

Garrett v. Hamilton Controls, Inc., 850 F.2d 253, 257 (5th Cir. 1988) (applying Texas law). *See also Oja*, 111 F.3d at 791; *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150-51 (6th Cir. 1996); *Witt v. Norfe Inc.*, 725 F.2d 1277, 1279-80 (11th Cir. 1984). Nonetheless, the states generally do not bar submission of both claims to the jury, and often have standard verdict forms that invite inconsistent verdicts by asking the jury to address negligent design even if the jury

has found no design defect on the strict liability claim. *See* Cal. Jury Instructions, Civil, Book of Approved Jury Instructions (BAJI) 16.11, Form of Special Verdict: Negligence and Products Liability (9th ed. 2003); Minnesota Practice Series: Civil Jury Instruction Guides, Special Verdict Form 75.94 (4th ed. 1999); Florida Standard Jury Instructions in Civil Cases: IX Model Jury Charges and Verdict Forms, Special Verdict Form for Model Charge 8 (2001). That makes for an inconsistent verdict nightmare: findings of negligent design in making a product with no defect.

This Court cannot change the state-law risk of inconsistent verdicts, but it can give clear guidance about the federal procedure for addressing it, so parties know what they must do to object, and courts know what they must do to avoid the problem or correct it when it arises. That guidance would be very helpful to many parties and courts.

B. Disparate Results And Unfair Verdicts.

A finding of waiver bars consideration of the merits. *See Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir. 1990); *see also United States v. Walton*, 255 F.3d 437, 441 (7th Cir. 2001) (waived issue "extinguishes all appellate review of the issue"); *Eagle Eye Fishing Corp. v. U.S. Dept. of Commerce*, 20 F.3d 503, 504 (1st Cir. 1994) (failure to object during administrative appeal barred judicial review).

Avoiding the merits is harsh in any case, and is particularly harsh where the issue is inconsistent verdicts. Inconsistent verdicts "undermine[] the validity and integrity of the judgment and may, in fact, run afoul of the

Seventh Amendment by allowing the District Court to usurp the jury's function." *See Mercer v. Long Mfg. N.C. Inc.*, 671 F.2d 946, 948 n.1 (5th Cir. 1982); *see also Figg v. Schroeder*, 312 F.3d 625, 643 (4th Cir. 2002) (citing *Mercer*); *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (in criminal bench trial, inconsistency alone is not intolerable but might "constitute evidence of arbitrariness that would undermine confidence in the quality of the judge's conclusion"). Entry of judgment on inconsistent verdicts necessarily disregards jury findings and gives little assurance that a fair and correct disposition was reached. *See Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-91 (2d Cir. 1988) ("Though [] Rule [49(a)] does not give guidance as to the proper course of action . . . it is plain that proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding."). That is true whether there was an objection or not; a judgment of liability based on negligent design disregards the jury's finding that the design was safe, and makes no sense.

Disparate waiver rules in the inconsistent verdict setting are outcome determinative: they lead to disparate results in like cases. Verdicts found inconsistent in a circuit with lax preservation rules will lead to a new trial. *See Bonin v. Tour West Inc.*, 896 F.2d 1260, 1262-63 (10th Cir. 1990); *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354-56 (9th Cir. 1987). But, as this case demonstrates, comparable verdicts in a circuit with strict preservation rules will lead to an affirmance of a judgment, even if the underlying verdicts clash and entry of judgment on one necessarily disregards the findings on the other.

That is fundamentally unfair. The same Rules of Civil Procedure govern all the district courts. It is not fair – or, we submit, constitutional – to permit strict preservation rules to sanction judgment entered against parties exonerated by the jury. It is not fair that disparate interpretations of preservation rules mean one party wins and another loses – not just the appeal, but the case – on the same objection record. *See Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts") (citation omitted).

The Court should grant certiorari to provide guidance on the proper rules of waiver under Federal Rules of Civil Procedure 49 and 51.

CONCLUSION

For these reasons, PLAC respectfully urges the Court to grant the Petition.

Respectfully submitted,

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